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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 71-485

MARIEMONT, INC.

Petitioner

v.

P. E. MASHETER, DIRECTOR OF HIGHWAYS, STATE OF OHIO

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971
No.

MARIEMONT, INC.
Petitioner

v.

P. E. MASHETER, DIRECTOR OF HIGHWAYS, STATE OF OHIO
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

The petitioner, Mariemont, Inc., prays for a writ of certiorari to review the orders of the Supreme Court of Ohio entered September 15, 1971, overruling its motion to certify and dismissing its appeal of right from the judgment entered on March 31, 1971, by the Court of Appeals for Franklin County, Ohio, reversing the judgment of the Court of Common Pleas of Franklin County, Ohio, in Case No. 236,855.

OPINION BELOW

The Supreme Court of Ohio wrote no opinion. The Court of Appeals for Franklin County, Ohio, rendered a written decision on January 12, 1971 (Appendix A, *infra*, pp. 14-23), which was not reported. Thereafter, on February 9, 1971, the Court of Appeals on reconsideration rendered a written unreported decision (Appendix B, *infra*, pp. 24-26), modifying its prior decision.

JURISDICTION

The orders of the Supreme Court of Ohio entered on September 15, 1971, overruling the petitioner's motion for an order directing the Court of Appeals for Franklin County, Ohio, to certify its records (Appendix C, *infra*, p. 27), and dismissing the appeal of right (Appendix D, *infra*, p. 28), are attached hereto. The jurisdiction of this Court is invoked under Rule 19 of this Court and 28 U.S.C. 1257 (3), which provides for review of final judgments rendered by the highest court of a state by writ of certiorari, "where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under the United States."

QUESTION PRESENTED

Where the owner of property is prohibited in an appropriation proceeding by a state from admitting evidence that the highest and best use of such property is commercial and that such usage was denied by zoning authorities as a means of depressing the value of such property, is the owner deprived of such property without due process, contrary to the Fourteenth Amendment to the Constitution of the United States?

PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS

The text of the relevant constitutional and statutory provisions involved herein is contained in Appendix E, *infra*, p. 29. These relevant provisions are:

Fourteenth Amendment to Constitution of the United States; Section 19, Article I, Ohio Constitution; Sections 163.02, 163.03, 163.06, 163.09, 163.14 of the Revised Code of Ohio.

STATEMENT OF THE CASE

Mariemont, Inc., an Ohio corporation, is the owner of an 8.5 acre tract of land which it acquired October 19, 1956. The tract is located on the south side of East Main Street, City of

Columbus, Franklin County, Ohio, west of McNaughten Road, and east of Noe-Bixby Road, with approximately 600 feet of frontage on Main Street to a depth of 630 feet. The land, which is the subject of an appropriation action filed by the Director of Highways of the State of Ohio, was at the time of its acquisition by Mariemont, Inc., located in the Township of Truro, County of Franklin, State of Ohio, and was subject to the Franklin County Zoning Resolution of 1948. At that time the property was zoned "Farm Residence."

In 1958, prior to the property's being annexed to the City of Columbus, the property owner filed an application with the Board of County Commissioners of Franklin County to have the property zoned under county zoning to "General Commercial". The Board of County Commissioners denied the rezoning because of an indication that there was to be some sort of an interstate route or highway that might come through this area. In 1958, when the application for rezoning was filed, the Board of County Commissioners had an oral understanding with the Ohio Department of Highways that the Board would not rezone any property that could be in the area of a future highway take.

When the property in question was annexed to the City of Columbus some time after 1960, it came into the city, pursuant to the provisions of City ordinances, in the classification of "R-1" zoning, which permitted only single-family residences. Subsequent to annexation, the property owner, on several occasions, filed an application with the City zoning authorities to change the zoning of the property to a "C-4" commercial use. On these occasions, the rezoning was denied because the property was possibly in the way of a public improvement. Various applications to rezone the tract were made from the time of the tract's annexation in early 1960 through late 1966. Each application was denied because the property was in an area where the highway take might occur.

In April, 1969, the Director of Highways, State of Ohio, filed a petition for appropriation of the entire tract consisting of 8.5 acres, the actual take occurring on July 14, 1969, for the purpose of constructing an interchange at the intersection of I-270 and East Main Street.

The evidence shows that lands which were in the immediate area to the east of McNaughten Road and south of East Main Street, and north of East Main Street were rezoned by the County of Franklin to a general commercial use. The evidence

further disclosed that the City of Columbus, by action of the City Council, rezoned property in the immediate area to C-4 commercial.

The evidence in the case consists of the testimony of William H. Davis, President of Mariemont, Inc., Jack B. Bachtel, formerly Planning Director of the City of Columbus from 1956 to 1962, Thelma Hardy, formerly Executive Secretary of the Franklin County Rural Zoning Commission for 17 years, George Little and Ivan Hill, real estate appraisers, on behalf of petitioner, and Donald Kelley and Roy F. Boyd, real estate appraisers, for the State of Ohio. In addition, seven exhibits consisting of maps, minutes of the Franklin County Rural Zoning Commission, and applications for rezoning by owners of tracts in the vicinity of petitioner's property were admitted in evidence.

During the course of the trial, objections were raised by attorneys representing the condemning authority to the property owner's appraisers stating their opinion concerning the highest and best use of the property. Said appraisers testified that in their opinion the highest and best use of the property was commercial. The attorneys for the condemning authorities asked that the testimony be stricken for the reason that the property was actually zoned for an "R-1" use, which did not permit commercial usage.

Mr. Jack B. Bachtel, former Planning Director for the City of Columbus from 1956 to 1962, testified that the predominant use of the land along East Main Street is commercial and that in his opinion the highest and best use of the Mariemont tract is "commercial". Mr. Bachtel testified that the planning staff had recommended against approval of the application for rezoning by Mariemont "because it was in the way of public improvement, which we knew that was going to take place. Therefore, we did not go into all of our land studies on the zoning application, but recommended denial because of the pending public improvement." (R. 74). Mr. Bachtel further testified (R. 81) –

> "A. We recommended disapproval of the application because of the pending improvement of the highway coming through at this location."

On cross-examination, Mr. Bachtel testified (R. 85) –

"A. I would say, sir, that the reason I remember it was we had considerable discussion and verbage back and forth on whether this case should be approved or denied back at the time the application came in and for what reason it should be approved or denied. That was because of the pending highway improvement."

Mrs. Thelma Hardy, formerly Executive Secretary of the Franklin County Rural Zoning Commission for more than 17 years, testified that the petitioner had filed an application for a change in the zoning from Farm Residential to General Commercial and that the application had been denied prior to the annexation of the property to the City of Columbus. Mrs. Hardy testified (R. 94) that —

"A. The application was denied because of an indication that there was to be some sort of an interstate route or a highway coming in and this, this area at that time this application was filed, there was an agreement that we would sort of hold this area until we saw the exact location. We had no indication at that time what the exact location was. So, we held up the zoning, not only on this piece of property but others, to see what the exact location of the highway would be.

"Q. Now, who was that agreement with?

"A. The Board of County Commissioners had an agreement not in writing, but it was sort of an agreement between them and the Highway Department.

"Q. This was way back in 1958?

"A. Yes, sir."

Mrs. Hardy further testified with respect to her opinion as to the highest and best use for the Mariemont tract (R. 96), as follows:

"A. I have an opinion that it could hardly help but be commercial and that this is the best use for it. To expect any land on Main Street to remain residential is a little bit ridiculous."

The appraisers for the State of Ohio testified as to the fair market value of the property. Mr. Kelley expressed his opinion that the property was worth $99,900 and Mr. Boyd expressed

his opinion that the property was worth $95,400. The president of the property owner, who had dealt in real estate all his life, testified that in his opinion the property was worth $360,000. Messrs. Little and Hill, the appraisers for the property owner, testified that in their opinion the property was worth $225,800 and $240,000, respectively. The jury, after deliberation, returned a verdict in the amount of $180,000 and judgment for this amount was entered.

The Court of Appeals, finding errors in the admission of evidence, respecting the value of the property at its highest and best use as "commercial," reversed the judgment and remanded the cause for hearing in accordance with the decision. The Supreme Court of Ohio denied the motion to certify the record and overruled the appeal as of right.

HOW FEDERAL QUESTIONS PRESENTED

The constitutional questions here involved were first put in issue in the petitioner's notice of appeal and memorandum in support of jurisdiction in the Supreme Court of Ohio in Case No. 71-308.

REASONS FOR GRANTING THE WRIT

A. *The Evidentiary Rules Adopted By The State Courts Are Confiscatory And Take Petitioner's Property Without Due Process*

The Fourteenth Amendment to the Constitution of the United States protects private property from appropriation by a state without due process of law. See, *Cincinnati v. Louisville & Nashville R. Co.*, 223 U.S. 390, 56 L. Ed. 481, 32 Sup. Ct. 267; *Bank of Toledo v. Toledo*, 1 Ohio St. 622 (1853); 19 O. Jur. (2d) 414, Eminent Domain, Section 7; 2A Nichols on Eminent Domain (3rd Ed., 1970), Section 7.31.

The constitutional provisions which require due process of law are of general application to all branches of government and thus affect the power of eminent domain. On the one hand, the sovereign is vested with the inherent right of eminent domain. On the other hand, the property owner is vested with an equally

inherent and fundamental right not to be deprived of his property without due process of law. This conflict has been resolved in favor of the right of the property owner to the extent that the exercise of the power of eminent domain is limited by the prohibition against depriving a person of his property without due process of law. *Hessel v. A. Smith & Co.*, 15 F. Supp. 953 (1936); *Sargent v. City of Cincinnati*, 25 N.P. (NS) 89, affirmed 110 Ohio St. 444 (1923).

Insofar as judicial proceedings are concerned, "due process" means law in its regular course of administration according to prescribed forms and in accordance with the general rules for the protection of individual rights. It is not limited to the due process of the settled usages of the past, but may include new methods of procedure unknown in common law, provided they are in harmony with accepted underlying principles of such procedures. *Heimlich v. Dispatch Printing Co.*, 17 N.P. (NS) 161, affirmed 6 Ohio App. 394, 27 O.C.C. (NS) 333 (1917). It is well settled that when private property is taken by eminent domain the owner of the property is constitutionally entitled to compensation. *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 37 L. Ed. 463, 13 Sup. Ct. 622; *Watson v. Pleasant*, 21 Ohio St. 667 (1871). "Just compensation" is an essential element of due process of law with respect to the taking of private property for public use. *West v. Chesapeake & Potomac Telephone Co.*, 295 U.S. 662, 79 L. Ed. 1640, 55 Sup. Ct. 894.

Due process of law includes not only notice and an opportunity to be heard by a competent tribunal in an orderly proceeding. It also requires rules of evidence which are reasonable. The property owner must be afforded an opportunity to present his case. *Crowell v. Benson*, 285 U.S. 22, 76 L. Ed. 598, 52 Sup. Ct. 285. Clearly, to the extent that a property owner is prevented from establishing the true value of his property by the rules of evidence adopted by state appellate courts, such owner's property is confiscated and taken without due process. As will be shown, this is the result under the decisions of the state appellate courts in the case at bar.

B. *A Court Which Refuses To Admit Evidence In An Eminent Domain Proceeding Showing That The Zoning Authorities, As A Means Of Depressing The Value Of The Property Which*

Might Be Taken By Appropriation At Some Future Date, Deprives The Property Owner Of His Property Without Due Process

Municipalities have sometimes been charged with using zoning ordinances to restrict development of property until they are ready to exercise their power of eminent domain. Although courts generally disfavor collateral attacks upon existing zoning regulations in valuation proceedings, the use of zoning power as a means of depressing the value of property which the municipality contemplates taking under the power of eminent domain has been regarded by the courts as such a maladministration of the power to zone as to have uniformly resulted in a declaration of the invalidity of the exercise of such power with respect to the property so affected. See, Annotation: Zoning as a factor in determination of damages in eminent domain, 9 A.L.R. (3d), 291, 296.

Courts have vigorously condemned as confiscatory the action of a public body in adopting a zoning regulation or denying a petition for rezoning merely for the purpose of decreasing land value or preventing its proper utilization in order to lower acquisition costs in eminent domain proceedings. See, 9 A.L.R. (3d), 291, 305, supra, and the numerous cases cited therein. In *State ex rel. Sun Oil Co. v. City of Euclid,* 164 Ohio St. 265, 130 N.E. (2d) 336 (1955), the Court had for determination a petition for mandamus by a vendor and purchaser of real estate to compel the city to issue a permit for erection of gasoline filling stations by the purchaser of land which the city, by resolution, had declared was necessary to appropriate for a proposed highway. In affirming the order of the Court of Appeals requiring the issuance of a building permit to the purchaser, the Supreme Court of Ohio quoted, with approval, the following paragraph from the decision in *Henle v. City of Euclid,* 97 Ohio App. 258, 125 N.E. (2d) 355, 358 (1954):

> "'The claim that the city has the right to "freeze" plaintiff's property, preventing her from its beneficial use until the city gets around to appropriating it for public purposes as a part of the Lakeland Freeway, is without foundation. If the city needs the property in that development, then an immediate proceeding in an eminent domain would end this lawsuit. All that has been done so far toward building the Lakeland Freeway is tentative in character.

> The proceeding looking to the construction of the freeway has not reached a stage compelling the city to appropriate the property, nor is the plaintiff compelled to stand by, paying taxes without benefit, until the development reaches a stage if it ever does, where her property must be taken for freeway purposes. Section 713.14, Revised Code.' "

A potential condemnor such as a municipality, may not, through the device of zoning for a use to which the property is not suited, depress its value preliminary to condemning it for a public purpose. See, 4 Nichols on Eminent Domain (3rd Ed., 1962), Section 12.322, citing *Board of State Institutions v. Tallahassee Bank & Trust Co.* (Fla. App.), 108 So. (2d) 74. In this connection, see, *In re Appropriation of Easement for Highway Purposes Over Property of Darrah,* 119 Ohio App. 315, 194 N.E. (2d) 582 (1963), where the Court quoted with approval from *Tallahassee Bank & Trust Co.,* as follows:

> " *** we are not inclined to commend an arbitrary exercise of the police power by one branch of government [zoning board] in order to pave the way for a less expensive exercise of the power of eminent domain by another branch to the detriment of the private property owner."

The testimony of Thelma Hardy and Jack Bachtel, as well as the report of the staff of the City Development Commission, show that the City of Columbus and the County of Franklin deliberately through the years from 1956 through 1966, and thereafter, prevented the petitioner's property from being rezoned in order to depress its value preliminary to condemning it for public purposes. Clearly, but for the proposed future highway going through this area, the area would have been rezoned, "commercial." Thus, the state appellate courts incorrectly find that the trial court erred in admitting evidence as to the activities of the zoning authorities in this respect. Clearly, a state court which refuses to admit evidence in an eminent domain proceeding showing that the zoning authorities, for the purpose of depressing the value of the property which might be taken by appropriation at some future date, deprives the property owner of his property without due process of law.

C. *In Arriving At The Fair Market Value Of Property In An Eminent Domain Proceeding, A*

Refusal To Permit Testimony As To The Highest And Best Use For The Property, Even Though Such Use Is Contrary To The Existing Zoning Of The Parcel Being Taken, Where Zoning Authorities Have Unlawfully Refused To Rezone, Deprives The Owner Of His Property Without Due Process

Real estate valuation calls for particular skills which laymen generally do not possess. Thus, courts frequently have resorted to the testimony of properly qualified experts for assistance in determining the effect which various zoning situations have on the value of the condemned property. 9 A.L.R. (3rd) 291, 323. Thus, in *People ex rel. Department of Public Works v. Hurd,* 205 Cal. App. (2d) 16, 23 Cal. Rptr. 67 (1962), it was held that there was no error in the admission of an expert's testimony as to the special benefits which certain parcels of real estate under condemnation would derive, even though the testimony was based almost entirely upon the reasonable probability of a change of zoning of the parcels.

In *State Roads Commission v. Orleans,* 239 Md. 368, 211 A. (2d) 715 (1965), the Court held that the allowance of testimony by a qualified witness of the probability of a zoning change which would affect the value of the condemned property was proper.

requested to express his opinion as to the effect of the Section 5511.01, Revised Code of Ohio, moratorium on zoning changes and building permits in determination of the value of property being appropriated with particular reference to determination of the highest and best use of the property for appraisal purposes. Attorney General Brown stated, *inter alia:*

"I believe that your question was definitively answered in the case of *In re Appropriation of Easement for Highway Purposes Over Property of Darrah et al.,* 118 Ohio App. 315 (1963), where the court held as follows at page 319:

" 'Since the immediate prospect of zoning change to the advantage of the property is material in determining its value upon the day of taking, any attempt by statute to exclude this evidence or opinions based thereon is an attempt to limit the property owner's right to obtain compensation from a jury as contemplated by Section 19, Article I of the Constitution of Ohio, and by the Fifth Amendment to the Constitution of the United States.

> " 'A constitutional question arises as to what is just compensation compatible with the requirement of the Fifth Amendment to the federal Constitution and Section 19, Article I of the Ohio Constitution when prospective uses presently prohibited by zoning are arbitrarily excluded as matters to be considered in calculating fair market value on the date of taking. *United States v. Meadow Brook Club*, 259 F. (2d), 41.' "

Attorney General Brown further stated –

> "It is a standard rule of construction that legislative enactments are not to be interpreted in such a way as to be in violation of constitutional provisions, where such a result can be avoided without doing violence to the clear meaning of the words. In conformity with that principle, it is my opinion and you are hereby advised that the purpose of Section 5511.01, Revised Code, as amended effective August 11, 1967, is *not* to exclude from consideration in an appropriation proceeding all *competent* evidence of highest and best use of a parcel even where such use might involve a variation from existing zoning, *** "

The evidence shows that there were numerous rezonings from residential to commercial in the immediate area of the petitioner's property along East Main Street after 1956, when the petitioner acquired such property, and as late as 1969; this evidence was adduced to show the existence of the probability of rezoning to commercial but for the contemplated highway going through the area. At least ten changes in zoning in the immediate area to commercial use were granted by both the county and by city governments. Even the experts for the State of Ohio testified –

> "Nobody would build single-family lots on Main Street. *** From that, I was able to conclude that the highest and best use was to purchase it and assume the risk, assume the burden, and assume the expense of getting it changed to either commercial or an apartment development."

Notwithstanding the decision of the court of appeals, it is clear that in arriving at the fair market value of property in an eminent domain proceeding a refusal to permit testimony as to the highest and best use of the property, even though such use is contrary to the existing zoning of the parcel being taken, where zoning authorities have unlawfully refused to rezone,

deprives the owner of his property without due process of law.

D. *Where It Is Shown That Other Similar Property In The Area Was Recently Rezoned Or That Development In Use Patterns Has Been Such That A Reclassification Would Fit Such Zoning Pattern Or Use, This Use May Then Be Considered As The Property's Highest And Best Use Even Though Contrary To Its Existing Zoning. A Refusal To Admit Such Evidence Deprives An Owner Of His Property Without Due Process*

If it can be shown that other similar property in the area was recently rezoned, or that the development in use patterns has been such that a denial of reclassification would probably be upset by the courts, the condemnee has a good chance of getting the valuation made on the basis of the probability of such a change. 9 A.L.R. (3d) 291, 298.

Although the probability of rezoning may not be founded upon a mere need for a change in zoning standards, a general change in the character of the use of property in the neighborhood has been held to show a reasonable probability of a change in zoning. Thus, evidence that a tract zoned for single-family residences was near the highway, was directly across from commercially developed property, and was some distance from schools, churches and a shopping area was held in *Park District of Highland Park v. Becker*, 60 Ill. App. (2d) 463, 208 N.E. (2d) 621 (1965), to warrant consideration of the probability of rezoning in the near future to commercial use in determining the value of the property taken in eminent domain. See, 4 Nichols on Eminent Domain (3d Ed., 1962), § 12.322 [1], and the numerous cases cited therein.

The proclivity of a zoning board toward change, as manifested by its favorable action on petitions for rezoning of other parcels, has been considered an influential factor tending to establish the reasonable probability of rezoning the condemned property. Thus, the Court in *0.040 Acres of Land v. State* (1964, Del. Sup.), 198 A. (2d) 7, held that there was a reasonable probability of rezoning where, along with other factors, the history of zoning in the area indicated a general trend from residential to commercial. See, 9 A.L.R. (3d) 291,

317, and the numerous cases cited therein.

The evidence in the case at bar is quite explicit that but for the proposed future highway going through this area the petitioner's property would have been rezoned commercial. The testimony of witnesses and exhibits clearly show that numerous rezonings from residential to commercial were granted in the immediate area both by city and county. Such zoning changes clearly showed the need for zoning the petitioner's property as commercial.

It is submitted that where it is shown, as in the case at bar, that other similar property in the area was recently rezoned, and that development in use patterns has been such that a reclassification would be appropriate, such use may then be considered as the property's highest and best use, even though contrary to its existing zoning. Consequently, the decision of the state court of appeals ordering a new trial without such evidence deprives the petitioner of its property without due process of law.

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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Columbus, Ohio 43215

Attorneys for Petitioner

APPENDIX A

IN THE COURT OF APPEALS
OF FRANKLIN COUNTY, OHIO

P. E. Masheter,
Director of Highways,
State of Ohio,

Plaintiff-Appellant,

-v-

No. 9933

Mariemont, Inc.,
William H. Davis, Statutory Agent,

Frankview, Inc.,
William H. Davis, Statutory Agent,

Marwell, Inc.,
William H. Davis, Statutory Agent,

New-Built Homes, Inc.,
William H. Davis, Statutory Agent,

Stylebilt, Inc.,
William H. Davis, Statutory Agent,

Golf Land, Inc.,
Holding Corporation of Ohio,
Statutory Agent,

Auditor of Franklin County, Ohio,

Treasurer of Franklin County, Ohio,

Defendants-Appellees.

DECISION

Rendered on January 12, 1971

MR. PAUL W. BROWN, Attorney General,
MR. C. WILLIAM DAWSON, JR., and
MR. RALPH C. GODWIN, Assistants,
Statehouse Annex,
Columbus, Ohio,
For Plaintiff-Appellant.

LUCAS, PRENDERGAST, ALBRIGHT,
GIBSON, BROWN & NEWMAN,
MR. ROBERT E. ALBRIGHT,
42 East Gay Street,
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For Defendants-Appellees.

MR. C. HOWARD JOHNSON, Prosecuting Attorney,
MR. WILLIAM W. HOLMES, Assistant,
Franklin County Courthouse,
Columbus, Ohio,
For Defendants-Appellees
Auditor and Treasurer of Franklin County.

TROOP, P. J.,

This appeal is from the verdict of a jury and a judgment entered pursuant thereto by the Court of Common Pleas of Franklin County on August 18, 1970. The land, the subject of the appropriation action filed by the Director of Highways of the State of Ohio, consisted of 8.50 acres, 0.55 acres presently occupied by U.S. Route 40, located on the south side of East Main Street, in the City of Columbus, between Noe-Bixby Road on the west and McNaughten Road on the east. The land was acquired by the present landowners, Mariemont, Inc., in 1956. (R. 113.) The "day of take" was stipulated to be July 14, 1969. The land, on the day of take, and presently, is zoned "R-1," single family residential, under an applicable ordinance of the City of Columbus. At the time of acquisition the tract was zoned farm-residence under the 1948 Zoning Resolution of the County of Franklin.

The appeal is taken on questions of law by the Director of Highways. The Attorney General, as counsel for the director, predicates the appeal upon eleven assignments of error, two of

which may be disposed of without comment. At the time of oral argument the Attorney General withdrew his objection to Special Charge No. 1. (Assignment of error 8.) Assignment of error 3 is an objection to the purely hearsay evidence in the testimony of George Little, who said, "I was advised by Mrs. Hardy" that the property in question would have been zoned commercial – "But for the highway." (R. 40, 41.) To have admitted such testimony was prejudicial error. Later discussion relates to the prejudicial nature of the statement.

Of the remaining nine assignments of error, two, Nos. 9 and 10, object to two special charges given by the trial court, and seven relate to the admission of evidence, oral testimony and exhibits. No attempt is made to discuss each assignment of error in detail. They are interrelated in that certain basic rules must be considered not only in order to dispose of a single assignment of error but also to resolve the larger questions necessary to be resolved by the appeal to this court. The approach is general with the hope that underlying law may be so presented as to decide the particular.

Respect for the basic rule in appropriation matters appears to be acknowledged by everybody involved in this lawsuit. The trial court told the jury that the amount to be awarded the landowner as compensation for the land taken was the amount determined to be the fair market value on July 14, 1969. (R. 294.)

It is equally clear that the type of evidence of value which courts approve permits an appraiser to consider the highest and best use for a property in arriving at an opinion of the value of the property. In the development of the case before the jury the conflict between the Director of Highways, seeking to appropriate the land, and the landowner arises upon suggestions as to highest and best use and not as to the determination of market value on July 14, 1969. Many factors enter into the consideration of buyers with respect to a given piece of land. Site analysis may be limited to present usage. It must be recognized, however, that a buyer may have in mind holding land out of use to await appreciation in value. The question is, narrowly and strictly, Just what price would a willing purchaser pay an equally willing seller for the premises taken on a particular day, July 14, 1969, in the instant case? Textwriters and courts accept valuations based upon highest and best use concepts, not only present use, but potential use providing it is a reasonably

probable use and not entirely speculative. All factors must be shown to influence the selling price on the day of "take."

The determination of compensation cannot be dependent upon whether or not there will be a change of zoning of the property in the future. Compensation must be based upon the fair market value of the property for its highest and best use available within existing zoning regulations. The *possibility* of future rezoning may not be utilized to increase the fair market value over that which an informed willing purchaser would pay under existing zoning. If, however, such a purchaser would be presently willing to pay more than an amount justified by the uses permitted under existing zoning because of a general belief that there is a *probability* of a change in zoning, to permit a more valuable use within the reasonably foreseeable future, such evidence is admissible because it does reflect a factor in the present fair market value under existing zoning.

Highest and best use as a value factor in the determinations of appraisers is subject to definite limitations imposed by law. A rather early case, although there were others earlier, provides a basic rule. In *In re Appropriation by Supt. of Public Works: Sowers, Supt.,* v. *Schaeffer et al.* (1951), 155 Ohio St. 454, the court announced the basic rule, as follows:

> "3. The rule of valuation in a land appropriation proceeding is not what the property is worth for any particular use but what it is worth generally for any and all uses for which it might be suitable, including the most valuable uses to which it can reasonably and practically be adapted."

A subsequent case, *In re Appropriation of Easement for Highway Purposes: Board of County Commrs.* v. *Thormyer, Acting Director of Highways* (1959), 169 Ohio St. 291, is important because of an addition to the language in the syllabus rule. In *Schaeffer* the phrase was, "the most valuable uses to which it *can reasonably and practically* be adapted." (Emphasis added.) In *Board of County Commrs.* the wording is as follows:

> "* * * the most valuable uses to which the land *can lawfully,* reasonably and practically be adapted."
>
> (Emphasis added.)

The additional term "lawfully" is the basis for the statements of textwriters and courts that the highest and best use is ordinarily

one which is permitted by zoning regulations. (See also 19 Ohio Jurisprudence 2d, pages 538 and 540, Section 122.)

But buyers do buy and pay more for a given parcel of land than can be supported by a present legally permitted use, a possible highest and best use not in conformity to existing zoning limitations. Courts appear to permit such a situation to be considered and relax the rigid rule limiting testimony to the highest and best use permitted by present zoning regulations, but only within definite limitations.

Several Ohio cases are pertinent to a discussion of the broader rule, including *Board of County Commrs.*, supra, which has to do with the taking of land as to which there is a deed restriction, *Masheter* v. *Bd. of Edn.* (1969), 17 Ohio St. 2d 27, in which land improved with school buildings is involved, and *In re Appropriation for Hwy. Purposes* (1969), 20 Ohio St. 2d 43, the decision of which emphasizes the necessity of charging on highest and best use.

More particularly, a series of three cases deals head-on with the matter of zoning restriction. The first of the group is *City of Euclid* v. *The Lakeshore Co.* (1956), 102 Ohio St. 96. Although not squarely in point on the matter of zoning, a very basic rule which is important to the latter part of this discussion, is laid down by the court in *City of Euclid.* It is noted here for emphasis, as follows:

> "6. The determination and fixing of zoning classifications within a municipal corporation is within the sound discretion of its legislative authority in the exercise of the public power to protect the public health, morals, safety and the general welfare of the people."

Judge Skeel found that there was no evidence that within the foreseeable future, in the reasonable administration of the zoning laws of the City of Euclid, there would be a change in the zoning of the land involved. The finding produced a headnote as follows:

> "7. In a proceeding to determine the value of land appropriated for public purposes, the trial court should not permit evidence of speculation on what may be the legislative policy of a municipal council in the future in changing a particular zoning classification, where such evidence is considered for the purpose of fixing

the value of the land taken."

The Portage County Court of Appeals cites and quotes from the *City of Euclid* decision in *In re Appropriation of Easement for Highway Purposes Over Property of Darrah et al.* (1963), 118 Ohio App. 315. The language of the court in *Darrah* is as follows:

> "In a proceeding by the Director of Highways to appropriate a parcel of land in a district zoned for residence use, but which because of zoning area restrictions has no lawful use under existing zoning regulations, where there is a reasonable probability of a change in the zoning classification to a commercial use within the reasonably foreseeable future, testimony of expert witnesses that the highest and best use of the property is commercial and as to the commercial value of the property is admissible, and its influence upon the fair market value at the time of taking may be taken into account."

At page 318 the court quotes Headnote 7 in *City of Euclid,* and then says:

> "We agree with this general proposition of law. Such evidence should be admitted if pertinent, and excluded, stricken or disregarded only if it is speculative or remote."

The most recent case in which the court faces squarely the matter of zoning restrictions is *Bd. of Edn.* v. *Graham* (1968), 15 Ohio App. 2d 196. The syllabus to this First District Court of Appeals decision is as follows:

> "The admission of testimony of a property owner in a trial to determine the value of his appropriated property, that he 'hoped' to obtain a change in the zoning of such property to permit a more valuable use thereof, is prejudicial error, where there is no competent evidence whatsoever that a change in the zoning classification would be likely to occur."

Judge Shannon relied upon the decision in the *City of Euclid* case, and says of it, page 201, "There, the trial court limited the evidence of the value of the property taken to the highest and best uses for which it was available within the zoning restrictions." His further comment is, "We hold this to be the law of

Ohio upon the subject involved." The Court of Appeals said, page 201, that the trial court correctly instructed the jury to eliminate speculation because there was no competent evidence before the jury "that within the reasonably foreseeable future the legislative authority of the City of Wilmington would rezone the real estate."

In the instant case it must be said that there was, as in *Graham,* no evidence that in the foreseeable future there would be a rezoning of the real estate involved. In fact, the very approach of counsel for the landowner is an admission that there is no foreseeable change in zoning. That approach is apparent from the testimony of George Little, adduced early in the trial, that as early as 1958 when he was associated with the Federal Bureau of Public Roads, public authorities, charged with the administration of zoning regulations, conspired to retain certain zoning in order to depress the values of properties necessary to be acquired for public improvement. Two portions of Mr. Little's testimony, admitted over objection (R. 35, 36), are as follows:

> "This is true, and this is not only true in this case but in most every case. Where a property is doomed for appropriation for highway purposes of some similar purposes, the municipality having control over zoning cooperate with the Highway Department."
>
> "Well, it is pure economics. The Government doesn't want to pay any more for a right-of-way than they have to. So, why have someone who owns a tract of land build a big apartment building right in the middle of a new highway going through here? So, zoning was denied on this property for that reason."

Attention is directed to an annotation in 9 A.L.R. 3d 291, titled "Zoning as a Factor in Determination of Damages in Eminent Domain." Two subdivisions of the annotation are noted particularly. The first, page 309, "III. Consideration of probability of rezoning," says that market value may reflect possible rezoning, but the door to such evidence is not thrown wide open. It is noted that:

> "* * * the courts have usually taken the view that a prospective purchaser on the open market, on a proper showing that such a change was reasonably probable in the reasonably near future, would consider the probability of such a change in zoning in valuing the

property, and that the courts in condemnation should also receive such evidence."

The annotators cite *City of Euclid* v. *The Lakeshore Co. et al.*, supra, as the Ohio case in accord with the above proposition.

The second section noted is equally important, if not more significant, than the first. At page 303 ¶5, titled "Attacks on validity of existing zoning; zoning designed to control cost to condemnor," subparagraph [a] says:

"It has generally been held that the validity of an existing zoning ordinance is not subject to a collateral attack in a trial for the determination of damages in eminent domain."

This we believe is the generally prevailing rule and the rule in Ohio even though courts quite generally vigorously condemn the practice of keeping acquisition cost low. In support of the general rule the annotators cite the Ohio case of *Henle* v. *City of Euclid* (1954), 97 Ohio App. 258. Headnote 3 reads as follows:

"3. A city cannot 'freeze' property thereby preventing the owner from improving it so that he may enjoy a beneficial use thereof only because the city may, in the future, need such property in constructing a freeway."

It must be emphasized that the relief sought in the Common Pleas Court by Henle was a declaratory judgment, injunction and equitable relief. The appeal taken from the decision of the Court of Appeals was dismissed by the Ohio Supreme Court in *Henle* v. *City of Euclid* (1954), 162 Ohio St. 280.

There are many decisions by Ohio courts that follow the rule announced in *Henle*, with its many ramifications. Suggested as typical is the by no means exhaustive list as follows: *Kessler* v. *Smith* (1957), 104 Ohio App. 213, appeal dismissed 169 Ohio St. 91; *The State, ex rel. Dille Laboratories Corp.*, v. *Woditsch, Dir.* (1958), 106 Ohio App. 541; *The State, ex rel. Prentke*, v. *Village of Brook Park* (1958), 107 Ohio App. 325; *Schlaglieck* v. *Winterfeld et al., Trustees* (1958), 108 Ohio App. 299; *State, ex rel. Mumma*, v. *Stansberry* (1964), 5 Ohio App. 2d 191; *The State, ex rel. Sun Oil Co.*, v. *City of Euclid* (1955), 164 Ohio St.

265; *State, ex rel. Mayfield Heights,* v. *Bartunek* (1967), 12 Ohio App. 2d 141; and *Burt Realty Corp.* Columbus (1970), 21 Ohio St. 2d 265.

There is no quarrel with the basic law announced by the trial court in its general charge (R. 295) that no governmental agency "can rely on restrictive provisions of its zoning ordinances to depress land value," nor with the further pronouncement:

> "* * * In your determination of the highest and best use of the property involved, you should also presume that all public officials will do their duty and make responsible decisions based solely on the fact in every case and not on any irrelevant matters or factors or pressures."

To have included, however, in an appropriation matter limited to an award of compensation for real estate taken by the State of Ohio for highway purposes, the question of the abuse of discretion by the legislative authority of the City of Columbus, and by inference the authority for Franklin County, in zoning regulation, was error and not in accord with the law of Ohio.

It is difficult to appraise each assignment of error in this appeal. The testimony of Jack Bachtel and Thelma Hardy, the objects of assignments of error 2 and 4, serves no purpose except to impugn the conduct of legislative authorities in zoning matters. Those assignments of error are well taken. The testimony of Ivan Hill, subject of assignment of error 7, is of the same tenor and No. 7 is likewise well taken.

There is an abundance of irrelevant, and in some instances prejudicial, testimony throughout the presentation of this case, such as in the testimony of Mr. Davis (R. 116 & 120), Mr. Hill (R. 139), and Mr. Little (R. 18). So much in fact that the admission of the trial court at R. 23 appears well taken.

There is sufficient error in the assignments of error noted to warrant a reversal of the judgment of the trial court. The ground rules as to admissible testimony concerning highest and best use, and what is not admissible respecting an indictment of the acts of a legislative authority in zoning matters, are sufficient to sort out the admissible from the inadmissible and prejudicial, which being interwoven with the valid evidence involved in the other assignments of error makes it impossible

to rule upon each of them in toto. Portions of the assignments or error addressed to the type of evidence criticized above are sustained and the remaining portions overruled.

The verdict and judgment of the trial court are reversed and the cause remanded for further proceedings according to law and in compliance with this decision.

STRAUSBAUGH and HOLMES, JJ., concur.

APPENDIX B

IN THE COURT OF APPEALS
OF FRANKLIN COUNTY, OHIO

P. E. Masheter,
Director of Highways,
State of Ohio,

Plaintiff-Appellant,

v.

No. 9933

Mariemont, Inc.,
William H. Davis, Statutory Agent,

Frankview, Inc.,
William H. Davis, Statutory Agent,

Marwell, Inc.,
William H. Davis, Statutory Agent,

New-Built Homes, Inc.,
William H. Davis, Statutory Agent,

Stylebilt, Inc.,
William H. Davis, Statutory Agent,

Golf Land, Inc.,
Holding Corporation of Ohio,
Statutory Agent,

Auditor of Franklin County, Ohio,

Treasurer of Franklin County, Ohio,

Defendants-Appellees.

DECISION

Rendered on February 9, 1971

MR. PAUL W. BROWN, ATTORNEY General,
MR. RALPH C. GODWIN, Assistant,
Statehouse Annex,
Columbus, Ohio,
For Plaintiff-Appellant.

LUCAS, PRENDERGAST, ALBRIGHT,
GIBSON, BROWN & NEWMAN,
MR. ROBERT E. ALBRIGHT,
42 East Gay Street,
Columbus, Ohio,
For Defendants-Appellees.

MR. C. HOWARD JOHNSON, Prosecuting Attorney,
MR. WILLIAM W. HOLMES, Assistant,
Franklin County Courthouse,
Columbus, Ohio,
For Defendants-Appellees
Auditor and Treasurer of Franklin County.

TROOP, P. J.

A recheck of the recorded oral argument of counsel at the time of hearing substantiates the contention of the Attorney General that he orally withdrew any objection to landowners' Exhibit 1. The motion of the Attorney General for reconsideration is, therefore, well taken and is sustained.

Upon reconsideration, the decision of this court is amended, at page 3, to read that the Attorney General withdrew his objection to landowners' Exhibit 1, and to strike the reference to assignment of error No. 8.

Assignment of error No. 8 must, consequently, be ruled upon as is requested by the appellant, director.

This court gives attention, at some length (beginning page 4), to the factors in the determination of the award to be given a landowner in appropriation situations, beginning with the basic rule of fair market value and including site analysis, highest and best use, holding out of use to await appreciation with reference to the reasonably probable best use, and concluding with the effect of existing zoning on highest and best use and the strictly

limited use of the probability of a change in zoning. It is emphasized that reference to a potential change in zoning is possible only within very definite limitations.

The very general nature of "Special Request to Charge No. 1," especially as to the total disregard of lawful use as respecting present zoning, and the complete absence of any direction pointing out the definite restrictions on a possible "variation from existing zoning," makes the instruction erroneous and prejudicial. Appellant's assignment of error No. 8 is well taken.

Upon reconsideration, the decision of this court issued January 12, 1971, is amended to reflect the correction of the error and the ruling sustaining appellant's assignment of error No. 8.

STRAUSBAUGH and HOLMES, JJ., concur.

APPENDIX C

THE SUPREME COURT OF THE STATE OF OHIO

THE STATE OF OHIO,
City of Columbus.

1971 TERM
To wit: September 15, 1971

P. E. Masheter,
Director of Highways,
Appellee,

vs.

Mariemont, Inc., et al.,
Appellants.

No. 71-308
MOTION FOR AN ORDER
DIRECTING
THE COURT OF APPEALS
for FRANKLIN County
TO CERTIFY ITS RECORD

It is ordered by the Court that this motion is overruled.

COSTS:

Motion Fee, $20.00, paid by Timothy J. Ucker _____

_____

_____

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court
this _____ day of _____ 19___.

_____ Clerk

_____ _____ Deputy

APPENDIX D

THE SUPREME COURT OF THE STATE OF OHIO

THE STATE OF OHIO,
City of Columbus.

1971 TERM
To wit: September 15, 1971

P. E. Masheter,
Director of Highways,
Appellee,

vs.

Mariemont, Inc., et. al.,
Appellants.

No. 71-308
APPEAL FROM
THE COURT OF APPEALS
for FRANKLIN County

This cause, here on appeal as of right from the Court of Appeals for FRANKLIN County, was heard in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.

It is further ordered that a copy of this entry be certified to the Clerk of the Court of Appeals for FRANKLIN County for entry.

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court
this _____ day of _____ 19____
_____ Clerk
_____ Deputy

APPENDIX E

CONSTITUTIONAL AND STATUTORY PROVISIONS

Fourteenth Amendment, United States Constitution:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 19, Article I, Ohio Constitution:

Private property shall ever be held inviolate, but subservient to the public welfare. When taken in time of war or other public exigency, imperatively requiring its immediate seizure or for the purpose of making or repairing roads, which shall be open to the public, without charge, a compensation shall be made to the owner, in money; and in all other cases, where private property shall be taken for public use, a compensation therefor shall first be made in money, or first secured by a deposit of money; and such compensation shall be assessed by a jury, without deduction for benefits to any property of the owner. (See Const 1802, Art VIII, § 4.)

REVISED CODE OF OHIO

§ 163.02 Appropriation of real property.

All appropriations of real property, except as otherwise authorized by this section, shall be made pursuant to sections 163.01 to 163.22, inclusive, of the Revised Code. The director of highways may appropriate any interest in real property pursuant to sections 163.01 to 163.22, inclusive, of the Revised Code or as otherwise provided by law.

Where so authorized by sections 6101.01 to 6101.84, inclusive, of the Revised Code, a conservancy district may appropriate real property by procedures prescribed in such sections.

Where so authorized by sections 6115.01 to 6115.79, inclusive, of the Revised Code, a sanitary district may appropriate real property by procedures prescribed in such sections.

HISTORY: 131 v 180. Eff 1-1-66.

§ 163.03 Entry upon real property; notice; damages.

Any agency may, upon the notice prescribed in this section, prior to or subsequent to the filing of a petition pursuant to section 163.05 of the Revised Code, enter upon any lands, waters, and premises for the purpose of making such surveys, soundings, drillings, appraisals, and examinations as are necessary or proper for the purpose of the agency under sections 163.01 and 163.22, inclusive, of the Revised Code, and such entry shall not constitute a trespass. Notice of such proposed entry shall be given to the owner or the person in possession by such means as are reasonably available not less than forty-eight hours nor more than thirty days prior to the date of such entry.

The agency shall make restitution or reimbursement for any actual damage resulting to such lands, waters, and premises and to improvements or personal property located in, on, along, over, or under such lands, waters, and premises, as a result of such activities. If the parties are unable to agree upon restitution or other settlement, damages are recoverable by civil action to which the state or agency hereby consents.

HISTORY: 131 v 180. Eff 1-1-66.

163.06 Deposit by public agency.

(A) A public agency, other than an agency appropriating property for the purposes described in division (B) of this section, which qualifies pursuant to Section 19 of Article I, Ohio Constitution, may deposit with the court at the time of filing the petition the value of such property appropriated together with the damages, if any, to the residue, as determined by the public agency, and thereupon take possession of and enter upon the property appropriated. The right of possession upon deposit as provided in this division shall not extend to structures.

(B) A public agency appropriating property for the purpose

of making or repairing roads which shall be open to the public, without charge, may deposit with the court at the time of filing the petition the value of such property appropriated together with the damages, if any, to the residue, as determined by the public agency, and stated in an attached declaration of intention to obtain possession and thereupon take possession of and enter upon the property appropriated, including structures situated upon the land appropriated for such purpose or situated partly upon the land appropriated therefor and partly upon adjoining land, so that such structures cannot be divided upon the line between such lands without manifest injury thereto. The jury, in assessing compensation to any owner of land appropriated under this division shall assess the value thereof in accordance with section 163.14 of the Revised Code. The owner or occupant of such structures shall vacate the same within sixty days after service of summons as required under section 163.07 of the Revised Code, at no cost to the appropriating agency, after which time the agency may remove said structures. In the event such structures are to be removed before the jury has fixed the value of the same, the court, upon motion of the agency, shall:

(1) Order appraisals to be made by three persons, one to be named by the owner, one by the county auditor, and one by the agency. Such appraisals may be used as evidence by the owner or the agency in the trial of said case but shall not be binding on said owner, agency, or the jury, and the expense of said appraisals shall be approved by the court and charged as costs in said case.

(2) Cause pictures to be taken of all sides of said structures;

(3) Compile a complete description of said structures, which shall be preserved as evidence in said case to which the owner or occupants shall have access.

(C) Any time after the deposit is made by the public agency under division (A) or (B) of this section, the owner may apply to the court to withdraw the deposit, and such withdrawal shall in no way interfere with the action except that the sum so withdrawn shall be deducted from the sum of the final verdict or award. Upon such application being made the court shall direct that the sum be paid to such owner subject to the rights of other parties in interest provided such parties make timely application as provided in section 163.18 of the Revised Code. Interest shall not accrue on any sums withdrawable as provided

in this division. (132 v H 188. Eff. 8-8-67; 132 v H 132, H 1, 131 v S 94)

163.09 Declaration of value and damages; time for assessment of compensation by jury; hearings.

(A) If no answer is filed pursuant to section 163.08 of the Revised Code, nor approval ordered by the court to a settlement of the rights of all necessary parties, the court on motion of a public agency shall declare the value of the property taken and the damages, if any, to be as set forth in any document properly filed with the clerk of courts by the public agency. In all other cases the court shall fix a time, within twenty days from the last date that such answer could have been filed, for the assessment of compensation by a jury.

(B) When an answer is filed pursuant to section 163.08 of the Revised Code, and any of the matters relating to the right to make the appropriation, the inability of the parties to agree, or the necessity for the appropriation are specifically denied in the manner provided in such section, the court shall set a day, not less than five nor more than fifteen days from the date the answer was filed to hear such questions. Upon such questions, the burden of proof is upon the owner. A resolution or ordinance of the governing or controlling body, council, or board of the agency declaring the necessity for the appropriation shall be prima-facie evidence of such necessity in the absence of proof showing an abuse of discretion by the agency in determining such necessity. If as to any or all the property or other interest sought to be appropriated, the court determines the questions in favor of the agency, the court shall set a time for the assessment of compensation by the jury within twenty days from the date of the journalization of such determination. An order of the court in favor of the agency on any of such questions or on qualification under section 163.06 of the Revised Code, shall not be a final order for purposes of appeal. An order of the court against the agency on any of such questions, or on the question of qualification under section 163.06 of the Revised Code, shall be a final order for purposes of appeal. If a public agency has taken possession prior to such order and such order, after any appeal, is against the agency on any of such questions, the agency shall restore the property to the owner in its original condition or respond in damages, which

may include the items set forth in division (B) of section 163.21 of the Revised Code, recoverable by civil action, to which the state consents.

(C) When an answer is filed pursuant to section 163.08 of the Revised Code, and none of the matters set forth in division (B) of this section is specifically denied, the court shall fix a time within twenty days from the date the answer was filed for the assessment of compensation by a jury.

(D) If answers are filed pursuant to divisions (B) and (C) of this section, or an answer is filed on behalf of fewer than all the named owners, the court shall set the hearing or hearings at such times as are reasonable under all the circumstances, but in no event later than twenty days after the issues are joined as to all necessary parties or twenty days after rule therefor, whichever is earlier.

(E) The court may, with the consent of the parties, order two or more cases to be consolidated and tried together, but the rights of each owner to compensation, damages, or both shall be separately determined by the jury in its verdict.

(1969 H 1. Eff. 3-18-69; 132 v H 188, H 132; 131 v S 94)

§ 163.14 Jury verdict; how determined.

In appropriation proceedings the jury shall be sworn to impartially assess the compensation and damages, if any, without deductions for general benefits as to the property of the owner.

The jury, in its verdict, shall assess the compensation for the property appropriated and damages, if any, to the residue, to be paid to the owners. When a building or other structure is on the property appropriated or when a building or other structure is situated partly upon the land appropriated and partly upon adjoining land so that the structure cannot be divided upon the line between such lands without manifest injury thereto, the jury, in assessing compensation to any owner of the land, shall assess the value thereof, as part of the compensation. The title to said structure shall vest in the agency which shall have the right to enter upon the adjoining land upon which any part of the structure is located for the purpose of removing said structure therefrom, after deposit in accordance with the verdict. Such removal shall be made within ninety days after taking title to the property appropriated; provided, that the

court may extend removal time upon such conditions as the court requires.

The verdict shall be signed by at least three-fourths of the members of the jury.

If a jury is discharged without rendering a verdict, another shall be impaneled at the earliest convenient time and shall make the inquiry and assessment.

HISTORY: 131 v 186 (Eff 1-1-66); 132 v H 132, §1. Eff 8-8-67.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-785

MARIEMONT, INC.,

Petitioner,

v.

P. E. MASHETER, DIRECTOR
OF HIGHWAYS, STATE OF OHIO

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

Of Counsel:

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CINCINNATI, OHIO

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-785

MARIEMONT, INC.,

Petitioner,

v.

P. E. MASHETER, DIRECTOR
OF HIGHWAYS, STATE OF OHIO

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

OPINIONS BELOW

The Supreme Court of Ohio wrote no opinion. The Court of Appeals for Franklin County, Ohio rendered a written decision which is attached as Appendix A, Petitioner's Brief pp. 14-23 and which was not reported. On February 9, 1971, the Court of Appeals on reconsideration rendered a written unreported decision modifying its prior decision. Such decision is attached as Appendix B, Petitioner's Brief, pp. 24-26.

JURISDICTION

Respondent does not question the jurisdiction as set forth in the Petition.

QUESTIONS PRESENTED

The question presented by the Petitioner is not entirely descripitive of the questions in the instant case. The two questions presented are:

1. Is the condemnee deprived of due process contrary to the Fourteenth Amendment of the Constitution of the United States, when prohibited in a condemnation proceeding from adducing evidence which attacks the validity of zoning regulations where ample opportunity for direct attack existed prior to the condemnation proceeding?

2. Where applications to rezone residential land for commercial purposes have been denied by the appropriate zoning authorities, is the condemnee deprived of due process contrary to the Fourteenth Amendment to the Constitution of the United States, when evidence evincing the highest and best use of such condemned property in the condemnation proceeding is limited to the lawful purposes within the effective zoning regulations plus any additional uses available by reason of the probability of a change in zoning?

PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS

The text of the following relevant constitutional and statutory provisions are contained in Petitioner's Brief (Apppendix E, p. 29).

Fourteenth Amendment to Constitution of the United States; Section 19, Article I, Ohio Constitution; Sections 163.02, 163.03, 163.06, 163.09, 163.14 of the Revised Code of Ohio.

Additionally, Sections 307.56 and 2506.01 of the Revised Code of Ohio are attached in Appendix A, infra, p. 16.

STATEMENT OF THE CASE

P. E. Masheter, Director of Highways, State of Ohio, hereinafter designated as the respondent, on July 14, 1969, appropriated 8.50 acres of land in the City of Columbus, Ohio for the construction of an interchange of Route I-270 and East Main Street in Columbus, Ohio. The petitioner, Mariemont, Inc., and Ohio corporation, is the owner of the 8.50 acres, of which 0.55 of an acre was occupied by the present road. The tract is located on the south side of East Main Street, City of Columbus, Franklin County, Ohio, midway between Noe-Bixby Road on the west and McNaughten Road on the east. Petitioner correctly states that the land, which is the subject of an appropriaion action filed by the Director of Highways of the State of Ohio, was at the time of its acquisition by Mariemont, Inc., located in the Township of Truro, County of Franklin, State of Ohio, and was subject to the Franklin County Zoning Resolution of 1948. Such resolution indicates that the subject property was zoned "Farm Residence."

Franklin County records indicate that the area in which the Mariemont, Inc. property is located, was annexed by the City of Columbus, Ohio, on November 17, 1958. Petitioner correctly states in his Statement of the Case that the property owner had filed an application with the Board of County Commissioners of Franklin County to have the property zoned under county zoning to "General Commercial" rather than "Farm Residence." There is no evidence adduced by the petitioner that an appeal or direct attack was ever made upon the denial by the Board of County Commissioners for the request to rezone the subject property, after the Board of County Commissioners denied the rezoning.

After the property in question was annexed to the City of Columbus, it was designated as "R-1" zoning, which permitted single family residences. Petitioner subsequent to the annexation, filed an application for rezoning with the City of Columbus zoning authorities requesting a zoning change of the property to "C-4" zoning, commercial use. The record indicates that the application was denied. Also, the record is completely devoid of evidence of any appeal by the petitioner from the adverse determination of the City of Columbus zoning authorities.

In the appropriation case which was tried before a jury in Franklin County Common Pleas Court, Columbus, Ohio, the petitioner over the objection of the Director of Highways, State of Ohio, introduced evidence that the subject property's highest and best use was commercial despite the fact that the zoning on the date of the take, July 14, 1969, was "R-1," family residence.

Petitioner's witness, Mr. George Little, testified (R. 24): "I felt the first 300 feet of this property would be, could be used for commercial purposes. The highest and best use of it, without doubt in my mind, is commercial." (R. 24) At this point there had been no testimony about zoning on the property, no testimony about denial of applications for rezoning for commercial purposes; and no testimony about the probability of a change in zoning. An objection and a motion to strike by the Assistant Attorney General was overruled.

The Director of Highways of the State of Ohio appealed from the verdict of the jury and a judgment entered pursuant thereto by the Court of Common Pleas of Franklin County on August 18, 1970. The Court of Appeals of Franklin County which rendered its decision on January 12, 1971, found error in the admission of evidence that the highest and best use of the property was commercial

and further found that it was error to include in an appropriation matter the question of the abuse of discretion by the legislative authority of the City of Columbus, and by inference the authority of Franklin County, in zoning regulations. The Court of Appeals reversed the judgment and remanded the cause for hearing in accordance with the decision. The Court's opinion which is attached to petitioner's brief as Appendices A and B, states at page 21:

> "It has generally been held that the validity of an existing zoning ordinance is not subject to a collateral attack in a trial for the determination of damages in eminent domain."

The Court in approving the above language stated at page 21:

> "This we believe is the generally prevailing rule and the rule in Ohio even though courts quite vigorously condemn the practice of keeping acquisition cost low."

The petitioner's motion to certify the record was denied by the Ohio Supreme Court. In addition, the Ohio Supreme Court overruled the appeal of petitioner as of right.

ARGUMENT

A. WHERE STATE STATUTES PROVIDE FOR APPEAL FROM DECISIONS OF ZONING AUTHORITIES, THE JURISDICTION OF THE TRIAL COURT DOES NOT INCLUDE THE RIGHT TO MAKE A DETERMINATION OF THE PROPRIETY OF ZONING DECISIONS WHICH WHERE THE PROPER SUBJECT MATTER OF APPEAL.

At page 20 of the decision of the Court of Appeals in the instant case, (Petitioner's Brief, Appendix A), is the following statement:

"In the instant case it must be said that there was, as in *Graham*, no evidence that in the foreseeable future there would be a rezoning of the real estate involved. In fact, the very approach of counsel for the landowner is an admission that there is no foreseeable change in zoning."

Beginning with this approach, counsel for landowner reached the conclusion that applications to amend zoning regulations on the subject property to commercial uses, were denied solely by zoning authorities because they were in collusion with highway officials to depress the value of the subject property.

The Court of Appeals further states (Petitioner's brief, Appendix A, page 22):

"To have included however in an appropriation matter limited to an award of compensation for real estate taken by the State of Ohio for highway purposes, the question of the abuse of discretion by the legislative authority of the City of Columbus, and by inference the authority for Franklin County, in zoning regulation, was error and not in accord with the law of Ohio."

At page 3 of Petitioner's Brief, it is stated:

"In 1958, prior to the property being annexed to the City of Columbus, the property owner filed an application with the Board of County Commissioners of Franklin County to have the property zoned under county zoning to 'General Commercial.' The Board of County Commissioners denied the rezoning because of an indication that there was to be some sort of an interstate route or highway that might come through this area. In 1958, when the application for rezoning was filed, the Board of County Commissioners had an oral understanding with the Ohio Department of Highways that the Board would not rezone any property that could be in the area of a future highway take."

Section 307.56 of the Revised Code of Ohio, entitled "Appeal from the decision of board of county commissioners," states:

> "A person aggrieved by the decision of the board of county commissioners in any case, may appeal within fifteen days to the court of common pleas, notifying the board of such appeal at least ten days before the time of trial. The notice shall be in writing, and delivered personally to the board, or left with the county auditor. At its next session, the court shall hear and determine the appeal, which decision shall be final."

Section 2506.01 of the Revised Code of Ohio, entitled "Appeal from decisions of any agency of any political subdivision," states in part as follows:

> "Every final order, adjudication, or decision of any officer, tribunal, authority, board, bureau, commission, department or other division of any political subdivision of the state may be reviewed by the common pleas court of the county in which the principal office of the political subdivision is located, as provided in sections 2505.01 to 2505.45, inclusive, of the Revised Code, and as such procedure is modified by sections 2506.01 to 2506.04, inclusive, of the Revised Code.
>
> "The appeal provided in sections 2506.01 to 2506.04, inclusive, of the Revised Code is in addition to any other remedy of appeal provided by law."

Headnote 1 of *Henle v. City of Euclid*, 97 O. App. 258 (1954) m.c.o. 162 Ohio St. 280, cited by petitioner (Petitioner's Brief, page 21), states:

> "A property owner is empowered to test by action seeking a declaratory judgment the constitutionality of the restrictions placed upon his property by a zoning ordinance."

The Ohio statute provided petitioner with the right of appeal from the decisions of Franklin County and City of Columbus zoning authorities affecting petitioner's property. A petition for a declaratory judgment afforded an additional remedy to test zoning regulations.

4 Nichols on Emnent Domain, (3d Ed.), Section 12.322, page 389, states in part:

> "Insofar as existing zoning restrictions circumscribe the available uses to which land may be devoted they unquestionably affect the market value of property and no evidence in support of an enhanced value may be admitted where such enhanced value would be the result of a proscribed use. It has been held that the owner cannot in the condemnation proceeding, attack the validity of a zoning ordinance where ample opportunity for direct attack existed prior thereto."

In *Robinson* v. *Commonwealth*, 335 Mass. 630 (1957) the trial judge, over the objection of the condemnee, excluded evidence that the applicable zoning ordinances restricting the lots being condemned to residential use were invalid and that if freed from the ordinances the land would otherwise have a substantial value. The Court rightly held at 728:

> "The petitioner had ample opportunity to attack directly the ordinances if he had desired to do so. He could have filed a petition in land court * * *, or he could have filed a suit for declaratory relief in the Superior Court * * * to determine the validity of the ordinances * * *; but in our opinion he could not at the trial of the petition for land damages against the Commonwealth attack the zoning ordinances. * * *"

In *Tharp* v. *Urban Renewal and Community Development Agency*, 389 S.W. 2d 453 (1965, Ky.), the property condemned was part of an urban renewal plan and had been rezoned from residential to light industrial. The property owners had sought unsuccessfully to have the property

rezoned to general business, while the condemning authority sought to have the residential classification retained.

The issue in the *Tharp* case is very similar to the instant case. In the condemnation proceedings, there was an attempt by the condemnees to offer evidence that "but for the influence of the condemnor, there would be a reasonable probability that the rezoning to general business would have been obtained." The court in refusing to allow the above evidence in a condemnation proceeding stated the appropriate law very succinctly:

> "Thus, it appears to us, it would not be appropriate to submit as an issue whether there is reasonable probability of obtaining a changed zoning in face of the action of the zoning authority. Such a submission would involve entirely collateral matters, to wit, the motives underlying the completed actions of the zoning authority and the factors both real and speculative that might influence their actions in the future."

We agree with petitioner's statements of the law under the heading "A," (Petitioner's brief, page 6) with respect to due process guarantees afforded a condemnee by virtue of the Fourteenth Amendment to the Constitution of the United States. However, we disagree that the property owner is prevented from establishing the true value of his property by the rules of evidence adopted by state appellate courts in the case at bar. The appellate court held that the "question of the abuse of discretion by the legislative authority of the City of Columbus, and by inference the authority for Franklin County, in zoning regulation" could not be included in the trial of an appropriation case. (Petitioner's Brief, Appendix A, page 22). The rulings of the appellate court do not result in the confiscation of petitioner's property, but merely place limitations on jurisdiction in the trial of an appropriation case.

B. IN ARRIVING AT THE FAIR MARKET VALUE OF PROPERTY IN AN EMINENT DOMAIN PROCEEDING, TESTIMONY OF THE HIGHEST AND BEST USE OF THE PROPERTY IS LIMITED TO LAWFUL PURPOSES INCLUDING THE PROBABILITY OF A CHANGE IN ZONING TO PERMIT A MORE VALUABLE USE WITHIN THE REASONABLY FORSEEABLE FUTURE.

Landowners offered no evidence that there was a probability of a change of zoning in the reasonably foreseeable future, as noted by the appellate court. (Petitioner's Brief, Appendix A, p. 20). The testimony of landowners was that a change of zoning had been denied because of an agreement with the Highway Department, and for that reason they were entitled to testify to a highest and best use for commercial purposes as if the change in zoning was an accomplished fact.

4 Nichols on Eminent Domain, (3d Ed.), page 238, states:

> PROBABILITY OF REZONING.
>
> "Where the enactment of the zoning restrictions is not predicated upon the inherent evil of the proscribed use—in other words, where the forbidden use is *malum prohibitum* rather than *malum in se*—and there is a possibility or probability that the zoning restriction may in the near future be repealed or amended so as to permit the use in question, such likelihood may be considered if the prospect of such repeal or amendment is sufficiently likely as to have an appreciable influence upon present market value. It follows from the foregoing that such possible change in the zoning regulations must not be remote or speculative.
>
> "An important caveat to remember in applying the rule is that the property must not be evaluated as though the rezoning were already an accomplished

> fact. It must be evaluated under the restrictions of the existing zoning and consideration given to the impact upon market value of the likelihood of a change in zoning. The caveat does not, of course, apply, and the evaluation may be predicated upon rezoning, as an accomplished fact, where the existing zoning was arbitrarily adopted for the sole purpose of depressing land values preliminary to eminent domain proceedings."

The principle of law included in the citation above is pertinent here for the reason that no zoning was arbitrarily adopted to depress land values. The existing zoning had been in effect since 1948.

Two Ohio cases which include a decision on the effect of zoning in appropriation cases are:

First, *City of Euclid* v. *The Lakeshore Co.*, 102 Ohio App. 96 (1956) m.c.o., app. dis. 165 Ohio St. 501 (1956), cert. den., 352 U.S. 1025. Headnotes 6 and 7 read as follows:

> "The determination and fixing of zoning classifications within a municipal corporation is within the sound discretion of its legislative authority in the exercise of the police power to protect the public health, morals, safety and the general welfare of the people.
>
> "In a proceeding to determine the value of land appropriated for public purposes, the trial court should not permit evidence of speculation or what may be the legislative policy of a municipal council in the future in changing a particular zoning classification, where such evidence is considered for the purpose of fixing the value of the land taken."

Second, *Board of Education* v. *Graham*, 15 Ohio App. (2d) 196 (1968), is in full support of *Lakeshore*. The headnote of *Graham* is as follows:

> "The admission of testimony of a property owner in a trial to determine the value of his appropriated

> property, that he 'hoped' to obtain a change in the zoning of such property to permit a more valuable use thereof, is prejudicial error, where there is no competent evidence whatsoever that a change in the zoning classification would be likely to occur."

At page 201, after quoting from *Lakeshore*, the court states:

> "We hold this to be the law of Ohio upon the subject involved. Therefore, we are confronted with the question whether there was any evidence that within the reasonably foreseeable future the legislative authority of the City of Wilmington would rezone the real estate. * * *
>
> "No testimony was offered nor, apparently, was any available from the lips of those who would be required to administer the zoning laws. Certainly, from those responsible for the administration of the zoning ordinances would come the best evidence upon the matter."

The petitioner cites Opinion No. 69-098, dated August 5, 1969 by the Attorney General of Ohio, Paul W. Brown, (Petitioner's Brief, Page 10). That opinion dealt with the effect, for appraisal purposes, of Section 5511.01, Revised Code of Ohio, upon the determination of the value of property being appropriated, with particular reference to determination of the highest and best use of the property. Section 5511.01, Revised Code of Ohio, provides for a moratorium on zoning changes and building permits for a period of 120 days.

We agree fully with the opinion of Attorney General Brown, but believe it is neither pertinent nor relevant for the reason that the effective date of the statute is November 14, 1967, and its provisions did not affect subject property. However, since the opinion has been cited by Petitioner.

It should be pointed out that the Attorney General further stated:

> "The Courts of Ohio, in applying and interpreting these constitutional guarantees, have held that the question to be decided in an appropriation proceeding is the value of the property for any and all uses for which it may be suitable, including the most valuable uses to which the property can lawfully, reasonably and practically be adapted. *Sowers* v. *Schaeffer*, 155 Ohio St. 454 (1951); *Board of County Commissioners* v. *Thormyer*, 159 Ohio St. 291 (1959).

C. WHERE IT IS SHOWN THAT OTHER SIMILAR PROPERTY IN THE AREA WAS RECENTLY REZONED OR THAT DEVELOPMENT IN USE PATTERNS HAS BEEN SUCH THAT A RECLASSIFICATION WOULD FIT SUCH ZONING PATTERN OR USE, WE CANNOT AGREE THAT THIS USE MAY THEN BE CONSIDERED AS THE PROPERTY'S HIGHEST AND BEST USE WHEN CONTRARY TO ITS EXISTING ZONING. A REFUSAL TO ADMIT SUCH EVIDENCE DOES NOT DEPRIVE AN OWNER OF HIS PROPERTY WITHOUT DUE PROCESS.

On direct examination, Mr. Boyd, an independent fee appraiser and witness for the respondent, was asked "* * * have you talked with any of the zoning officials of the City of Columbus in regard to the zoning of the area in which Mariemont is located" and "What did they tell you?" (R. 251) He testified:

> A. "Well, I can show you easier. First of all, I talked with Mr. Grant Dyer and Mr. Smithers at the Zoning Office, and the answers on several occasions were all pretty much the same. Columbus—and this is in Columbus now—no longer favors what they call commercial strip development, which means this type of development down the frontage strip of a road or

a highway in a city at least. They now believe in, and good planning dictates, that commercial zoning should be clustered or grouped primarily at major traffic intersections. Therefore, this is why we see this, of course, at interchanges of freeways and expressways and why the outlying residential type shopping centers have sprung up. The city favors this type of development, and they want to get away from the shabby appearance of strip development, all part of the present ecology drive, I guess. But, it is just that they don't want the landscape all full of billboards and small commercial development and so forth. They want them clustered. I was told by these men that the logical place for any commercial zoning in this area, if they were to grant it, would be, and eventually turned out to be, at the intersection of McNaughton and—or down here at the intersection of the relocated Noe-Bixby Road. It was highly unlikely that they would view favorably any request for commercial zoning between these points. They indicated that this zoning, which is on the property now, apparently it is—I think in this instance here, it is this colored lines here, and they indicate fairly well what the zoning is. They indicate that that zoning was granted as a result of the proposed alignment of this freeway and the interchange at Main Street and that this is in accordance with their overall plan and theory and philosophy of granting higher types of use around interchanges and around particularly highway oriented uses, commercial uses, which would be service stations and so on and so forth. They are clustered right around the interchanges." (R. 251, 252, 253)

The evidence shows commercial zoning along East Main Street in the City of Whitehall (R. 149) in Franklin County (R. 101) and in the City of Reynoldsburg (R. 146); additional commercial areas at the corner of East Main Street and Noe-Bixby Road and at the corner of East Main Street and McNaughten Road; also evidence of recent rezonings from residential to commercial at these two corners. In addition, there were rezonings from resi-

dential to commercial prior to July 14, 1969, the date of take of a part of the residue of parcels after the alignment of the new highway was determined. (R. 54 and 55.)

Petitioner's land in its location about midway between Noe-Bixby and McNaughten Roads, a distance of about three-quarters of a mile, was not affected by commercial zoning at the East Main Street corners at Noe-Bixby and McNaughten Roads. Commercial zoning in the Cities of Whitehall and Reynoldsburg, and Franklin County, did not affect subject property, for the reason that it was in the City of Columbus, a separate political entity, which was not being influenced in its zoning policy for this area by other political subdivisions. The commercial rezonings of residues of parcels after the alignment of the new highway was determined, should not be considered in determining highest and best use on the day of take. Those residues are a result of the coming of the new highway, and show the situation after construction is completed.

It is submitted that where the condemnee in an appropriation case is precluded from including the question of the abuse of discretion by legislative authorities in zoning regulations, and limited to a highest and best use of its property within the lawful zoning regulations, plus any additional value the property may have by reason of the probability of a change in zoning, there is no taking of condemnee's property without due process of law.

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX A

307.56 (2461). Appeal from decision of board of county commissioners.

A person aggrieved by the decision of the board of county commissioners may appeal to the court of common pleas, as provided by and under the authority of Chapter 2506. of the Revised Code. The court shall advance such appeal when perfected for immediate trial. (130 v H 396. Eff. 9-24-63)

2506.01. Appeal from decisions of any agency of any political subdivision.

Every final order, adjudication, or decision of any officer, tribunal, authority, board, bureau, commission, department or other division of any political subdivision of the state may be reviewed by the common pleas court of the county in which the principal office of the political subdivision is located, as provided in sections 2505.01 to 2505.45, inclusive, of the Revised Code, and as such procedure is modified by sections 2506.01 to 2506.04, inclusive, of the Revised Code.

The appeal provided in sections 2506.01 to 2506.04, inclusive, of the Revised Code is in addition to any other remedy of appeal provided by law.

A "final order, adjudication, or decision" does not include any order from which an appeal is granted by rule, ordinance, or statute to a higher administrative authority and a right to a hearing on such appeal is provided; any order which does not constitute a determination of the rights, duties, privileges, benefits, or legal relationships of a specified person; nor any order issued preliminary to or as a result of a criminal proceeding. (127 v 963. Eff. 9-16-57.)